ENFORCEMENT OF ATTORNEY'S LIEN UNDER THE NEW YORK CODE OF CIVIL PROCEDURE IN CASE OF SETTLEMENT BY CLIENT.

The numerous and, in some respects, conflicting decisions rendered within the last few years, interpreting section sixty-six of the Code of Civil Procedure, have thrown sufficient doubt upon the proper procedure for the enforcement of the attorney's lien in cases where the client effects a settlement with the adverse party, either before or after judgment, to justify an attempt to review and analyze the more important cases on the subject with the hope of making clear the points that have actually been decided and of suggesting the procedure which seems founded on the soundest reasoning as well as best calculated to protect the interests of all parties.

As the case of Welsh *v.* Hole,[1] decided in 1799, is generally supposed to be the first judicial deliverance upon this topic, and as it is the foundation of many of the decisions in New York, it furnishes a natural and proper introduction to the subject. The facts were as follows: In an action for assault there was a verdict for the plaintiff, damages twenty pounds, upon which judgment was entered. Pending a writ of error which had been brought, the plaintiff personally compromised the debt with the defendant, for the sum of ten guineas for "debt and costs" and executed a release. On a rule to show cause why the defendant should not pay the plaintiff's attorney his bill of costs, Lord Mansfield said:

"An attorney has a lien on the money recovered by his client, for his bill of costs. If the money come to his hands he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, *if the attorney gave notice to the defendant not to pay till his bill should be dis-*

[1] Douglas Rep. 238.

charged, a payment by the defendant after such notice would be in his own wrong and like paying a debt which has been assigned after notice.[1] But I think we cannot go beyond these limits,"

and, although there was some evidence of collusion, the rule was discharged, chiefly on account of lack of notice to defendant.

The early rule in cases of settlement before judgment is declared in Swain *v.* Senate,[2] decided in 1806. The defendant, being in custody, upon an arrest for one hundred and eighty pounds, put in bail and then went abroad. Thereafter, the plaintiff called at the house of one of the bail and proposed to settle the action for less than half the above amount, and to give full discharge of the debt and costs. To this proposition the bail assented, and requested the defendant's attorney to attend the plaintiff for the purpose of effecting the settlement, which was done, and the transaction completed without the knowledge of plaintiff's attorney. Soon after, however, he received information thereof from defendant's attorney, and, notwithstanding the settlement, proceeded to judgment, and issued a *scire facias* against the bail. Upon a rule to show cause why these proceedings should not be set aside with costs, Sir J. Mansfield, Ch. J., in his opinion, says:

"*The present is not the case of the defendant himself paying a sum of money to the plaintiff in consequence of an agreement between them without the intervention of a professional man.* Here the bail himself calls upon the defendant's attorney, who goes to the London Coffee House within the rules of the Fleet, and there settles with the plaintiff. This was a strong measure for an attorney, who must have known that the plaintiff's attorney had a lien for his costs. The debt was £180, and it is not suggested that anything less than the whole debt was due. The whole debt, then, and the costs being due, the plaintiff, a prisoner, is content to take £40 in money, and an acceptance for £35 19s. 9d. more, and to give up the rest amounting to £140, and his costs. Why should the plaintiff, who was a distressed man, give this up; and how could the defendant's attorney, acting for the bail, possibly authorize such a transaction, without feeling that he was taking out of the hands of the plaintiff's attorney that which, if it had been paid in the regular course, would have enabled the latter to obtain his costs? *It appears to me, that one great object of this transaction was to deprive him of his costs; and if the payment was fraudulent and collusive,* I think that the plaintiff's attorney ought to be allowed to proceed with the suit for the recovery of his costs."

[1] All italics in this article are the writer's.

[2] 5 Bosanq. & Puller, New Rep. 99.

The other justices concurring in the view that the transaction was fraudulent and collusive, the court was about to discharge the rule, when counsel for the defendant prayed that the proceedings might be stayed on payment of costs, which the court ordered accordingly.

In Chapman *v.* Haw,[1] decided in 1808, a settlement was effected between plaintiff and defendant, without the knowledge of the plaintiff's attorney, after the entry of an interlocutory judgment and pending the execution of a writ of inquiry, the entire amount of the debt being paid, and one guinea toward the costs, the plaintiff agreeing to pay the balance of the costs and giving the defendant a note addressed to his attorney in which he requested that the proceedings might be stayed as the defendant had settled the debt and costs. This note was taken to the plaintiff's attorney, who, nevertheless, proceeded to execute the writ of inquiry and signed final judgment for damages and costs, which he levied. An application for an order setting aside the judgment and execution, and returning the money which had been levied, was made on behalf of the defendant and granted on the ground "that there seemed to be no fraud on the attorney in this case." It appeared on the argument that the plaintiff had been ready to pay his attorney the costs, if application had been made to him, but the court makes no mention of this fact in announcing the decision.

The other English cases, decided about the same period, and frequently cited[2] are based upon the foregoing decisions, and announce no new rules, nor will the examination of cases in New York State prior to the Code disclose any essential modifications of the principles controlling these English decisions; so that the rules at the date of the enactment of the Code of Civil Procedure in 1848 may be stated as follows:

First: So far as the proceedings under consideration are concerned, the attorney's claim, whether before or after judgment, was confined to costs.

Second: After judgment, the claim became a lien upon

[1] 1 Taunton's Rep. 341.

[2] Cole *v.* Bennitt, 6 Price's Rep. 15; Marr *v.* Smith, 4 Barn. & Ald. 466; Morse *v.* Cook, 13 Price's Rep. 473.

the judgment; and, to the extent of his costs, the attorney was considered the equitable assignee of the judgment.

Third: Settlement of an action could be effected by the parties, notwithstanding the attorney's claim, and compromise of a judgment made by the parties, notwithstanding the attorney's lien.

Fourth: If, however, a settlement of an action, before judgment, was effected by the parties fraudulently and collusively, for the purpose of cheating the attorney out of his costs, the attorney could proceed with the action for the purpose of collecting the costs.

Fifth: The mere fact that a settlement of an action was effected by the parties without the attorney's knowledge, did not render the settlement fraudulent as to the attorney.

Sixth: Payment of a judgment to one party by the adverse party, or compromise thereof, after notice not to pay until the attorney's bill was discharged, was, to the extent of the attorney's lien, payment in the adverse party's "own wrong," and, upon proper application, satisfaction of judgment would be set aside, and execution allowed to be issued for the collection of the lien.

The Code of Procedure contained the following provision bearing upon the question:

> Sec. 303. "All statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity, for his expenses in the action; which allowances are in this act termed costs."

About ten years after the passage of this statute a case arose[1] in which an agreement had been entered into between the plaintiff and his attorney by which the latter was to commence and prosecute the action against the defendant at his own risk, his compensation to be contingent upon the success of the action. If successful, the attorney was to receive one-half the recovery, and if the amount should not exceed six hundred dollars, he was also to have the taxable

[1] Rooney *v.* Second Avenue R. R. Co., 18 N. Y. 368.

costs. Judgment was recovered for an amount which entitled the attorney, under the terms of this agreement, to $589.58. The defendant had notice of the attorney's claim. It appears that the defendants negotiated a compromise of the judgment with the plaintiff without the attorney's knowledge, and had a satisfaction of the judgment entered on the record. The attorney thereupon obtained an order vacating the satisfaction, unless the defendant should within five days pay to the plaintiff's attorney the amount of the taxed costs included in the judgment, with the costs of the motion. Upon an appeal from this order, the question before the Court of Appeals, as stated by Comstock, J., was as follows:

> "It is not claimed that the order appealed from was erroneous, provided the attorney for the plaintiff had a lien on the judgment for his costs. The defendants had sufficient notice of the lien, if it existed to protect him against a settlement with his client. The question is, therefore, whether the Code of Procedure has abrogated the lien of an attorney for his costs."

It was decided that the lien was not abrogated; that the effect of the provision was simply to remove the restriction which had theretofore existed limiting the lien on the judgment to the amount of the taxable costs, so that, under the Code, the attorney and client might fix beforehand the amount for which the attorney should have a lien on the judgment when recovered; that it was still true that the attorney was to be regarded as the equitable assignee of the judgment to the extent of his claim; and that, in the case before the court, the attorney should have been allowed to collect his whole claim and not merely the taxable costs. The appeal, however, having been taken by the defendant, the order in this respect could not be modified. No decision, therefore, was made as to the method by which the existence and the extent of the lien, in excess of taxable costs, should be determined as between the attorney and the defendant.

In this connection, attention may be appropriately directed to the case of Goodrich *v.* McDonald,[1] decided in 1889, but which was based on section sixty-six of the Code of Civil Procedure as it stood prior to the amendment of 1879, the section then being equivalent to section three

[1] 112 N. Y. 157.

hundred and three of the old Code so far as the question involved was concerned. A judgment had been obtained, the proceeds thereof had been paid to the judgment creditor with the acquiescence of the attorney's administrator (the attorney having died prior to this payment), and a portion of the proceeds had been invested in a bond and mortgage, which had been assigned to the mother of the judgment creditor. The administrator, being unable to collect the amount of the attorney's claim, from the judgment creditor, commenced an action against her and her mother for the purpose of establishing a lien upon the bond and mortgage. The case may well stand upon the single ground that under the facts there had been an express waiver of the lien, but the court also rests its decision, reversing the judgment, which had been rendered in plaintiff's favor, upon another ground. It is declared that the attorney's lien upon the judgment "is not strictly like any other lien known to the law, because it may exist, although the attorney has not, and cannot, in any proper sense have possession of the judgment recovered. It is a peculiar lien enforced by peculiar methods." The methods by which the courts have protected the attorney's interests are reviewed, and it is said that

"after a very careful search we have been unable to find any case where an attorney has been permitted to enforce his lien upon the judgment for his services by an equitable action, or where he has been permitted to follow the proceeds of the judgment after payment of them to his client. His lien is upon the judgment, and the court will enforce that through the control it has of the judgment and its own records, and by means of its own process, which may be employed to enforce its judgment. But after the money recovered has been paid to his client, he has no lien upon that, and much less a lien upon the property purchased with that money, and transferred to another."

The question whether the Code provision of 1848 had made any change in the rules relating to the attorney's claim in cases of settlement of the action before judgment was squarely presented to the Court of Appeals in 1877 by an appeal from an order reversing a judgment in favor of defendants entered upon a report of referee, and granting a new trial, in an action brought to recover damages for injuries alleged to have been sustained by reason of

the defendants' negligence.[1] The customary agreement for a contingent fee had been made between plaintiff and his attorneys and reduced to writing. The following day suit was commenced by service of summons, and, at the same time, notice was given to the defendant that the attorneys were interested in the cause of action for their services to the extent of one-half thereof. A settlement was subsequently affected by the parties, which the referee found to be "fraudulent and collusive as against plaintiff's attorneys." After the settlement, the attorneys served a complaint in the action, and the defendant's attorneys served an answer, setting up the settlement in bar of the action. Judge Earl, in delivering the opinion of the court, after declaring that it is a general rule that the parties to an action may settle the same without the interference of their attorneys, refers to the practice of the Courts in permitting the attorney, in case of a collusive settlement, to go on with the suit for the purpose of collecting his costs, and says:

"It is impossible to ascertain precisely when this practice commenced, nor how it originated, nor upon what principle it was based. It was not upon the principle of a lien because an attorney has no lien upon the cause of action, before judgment, for his costs; nor was it upon the principle that his services had produced the money paid his client upon the settlement, because, that could not be known, and in fact no money may have been paid upon the settlement. So far as I can conceive it was based upon no principle. It was a mere arbitrary exercise of power by the courts; not arbitrary in the sense that it was unjust or improper; but in the sense that it was not based upon any right or principle recognized in other cases. The parties being in court, and a suit commenced and pending, for the purpose, of protecting attorneys, who were their officers, and subject to their control the court invented this practice and assumed this extraordinary power to defeat attempts to defeat the attorneys out of their costs. The attorneys' fees were fixed and definite sums easily determined by taxation, and this power was exercised to secure them their fees."

Reference is then made to the constantly recognized rule that *after judgment* the attorney has a lien upon the judgment upon the theory that it has been procured by his skill and services, and that under the Code [2] that lien extends to any compensation agreed upon between client and attorney and is not limited to costs, and the rule

[1] Coughlin *v.* N. Y. C. & H. R. R. Co., 71 N. Y. 443. [2] Sec. 303.

is declared that, *before judgment*, in the absence of any agreement (referring to assignments of an interest in a cause of action where the cause is in its nature assignable)

"the attorney has not now and never had any lien upon or interest in the cause of action; and when the cause of action is like this, such as by its nature is not assignable, the party owning it cannot by any agreement give his attorney or other person any interest therein. * * * Therefore, if the attorneys are entitled to the protection they now seek, *it is only by the exercise of the extraordinary power of the court to which I have first above alluded, and I am prepared to say that such power should not be exercised in a case like this.*[1] *It has not been conferred upon the courts by statute, usage or common law.* Its exercise to secure to an attorney the statutory fees, small in amount, and easily ascertainable, was just and proper and could lead to no abuse. But to exercise it to enforce all contracts between clients and attorneys, however extraordinary, is quite another thing. Here the attorneys were contractors. They took the job to carry this suit through and to furnish all the labor and money needed for that purpose, and they are no more entitled to the protection which they now seek than any other person not a lawyer would have been, if he had taken the same contract."

Quotation at such length has been made from this opinion, because the difference between the nature of the attorney's claim before and after judgment, prior to the amendment of the statute, is nowhere more clearly stated, nor will it be easy to find a better characterization of the position of an attorney under agreements for contingent compensation.

No essential modification of the statute occurred until the amendment of Section Sixty-six of the Code of Civil Procedure, which was made in 1879, and, until that amendment, the only marked change in the rules above stated, which was made by the Code of 1848, as interpreted by the courts, was to extend the attorney's lien after judgment to the amount of his agreed compensation, in case notice was given, and not confine it to the taxable costs.

The Coughlin case simply made clear the fact that there was no lien before judgment, and that the court would not allow the action to be prosecuted for the attorney's benefit, in case of fraudulent settlement, for any claim beyond the taxable costs. It would seem, although this does not ap-

[1] For a recent exercise of the "extraordinary power" of the courts to protect attorneys against collusion and fraud, where there was no lien, see Nat. Exhibition Co. *v.* Crane, 167 N. Y. 505.

pear to have been directly decided,[1] that the only reason why the attorney was ever allowed to prosecute the action, even for his taxable costs, was that it was only by this method that he could, in the common-law courts, get his claim in such a form that he could collect it by execution against defendant's property.

If this view is correct it has an important bearing upon the question, as to whether any such course should have been allowed after the amendment of 1879, and the further question as to the propriety of continuing the practice, since the amendment of 1899, even if it was proper until that date.

At the time, then, that the amendment of 1879 went into effect, an attorney might in many cases of settlement be entirely without remedy, and, in other cases, the remedy was but partial. If his client was insolvent, and effected a settlement before judgment that was not fraudulent as to the attorney, even though it was without his knowledge, he would not be allowed to prosecute his action even for his costs, and there was no other remedy against the adverse party. If the settlement was fraudulent he might be allowed to prosecute the action for the costs, but there was no remedy against the adverse party for any additional compensation which had been agreed upon, unless the cause of action was assignable, and a legal assignment had been made of an interest therein, in which case he would really recover as assignee and not as an attorney.[2] After judgment, if proper notice had been given to the adverse party, the lien extended to the agreed compensation, but the method of determining the amount in excess of the taxable costs, as against the adverse party, was not clearly pointed out. If, however, the notice was not adequate, there was no remedy against the adverse party, and the judgment having been paid, or compromised, the attorney had no lien upon and could not follow the proceeds.[3]

The evident intention of the amendment referred to was to place attorneys in a more favorable position in cases

[1] See *dicta*, however, in following cases: Schriever *v.* Brooklyn Heights R. R. Co., 39 Misc., 145, at page 149; Fenwick *v.* Mitchell, 34 Misc. 617. [2] Coughlin *v.* N. Y. C. & H. R. R. Co. *supra.*

[3] Goodrich *v.* McDonald, *supra*, and cases cited.

of settlements made contrary to their wishes or without their knowledge, section sixty-six, after such amendment, reading as follows:

"The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

The statute remained in this form for twenty years. Bearing in mind the rules relating to the subject which had been declared by the courts, an examination of this statute would lead to the conclusion that it had a three-fold purpose. First, To abolish the difference between the attorney's position before and after judgment, making the attorney an equitable assignee of the cause of action, whatever form it might assume during the progress of the case, so that his remedy against the adverse party in case of settlement before judgment would be of the same nature as if the settlement had occurred after judgment. It is suggested in this connection that the words "which attaches to a verdict, report or decision in his client's favor" may have been inserted to forestall the argument that might be urged if they had been omitted, that the cause of action being merged, *e. g.* in the judgment, and the lien being on the "cause of action," the lien was gone when the judgment was obtained. Second, To remove the necessity for formal notice of the lien at any stage of the action, the statute itself giving notice. Third, To enable the attorney to follow the proceeds of a judgment, etc.

If the view expressed in an earlier portion of this article is well founded, that the only reason for the courts allowing the prosecution of an action by an attorney after settlement was that he might have some claim that might be enforced by process of the courts against the adverse party, it would seem to follow that under the above amendment, the attorney, being an equitable assignee from the beginning of the action, and the statute itself giving notice, and providing that the lien cannot be "affected by any set-

tlement," any payment made in settlement of an action to plaintiff by defendant in disregard of the attorney's claim would be a payment in "defendant's own wrong"; that, as to the attorney, the defendant would still be considered as in possession of the money and liable to the attorney in the proper action or proceeding, and, therefore, the attorney should neither be allowed nor obliged to prosecute the action which the plaintiff has settled. It must be admitted however, that the decisions under the amended section do not adopt this view with reference to the prosecution of the action.

The following points may be considered as established under the amended section as it remained until September 1, 1899.

First, The section does not deprive parties of their control over the action or their right to effect a settlement either before or after judgment.[1]

Second, No notice of the lien is now required; it "is a statutory lien of which all the world must take notice, and anyone settling with a plaintiff without the knowledge of his attorney does so at his own risk",[2] and the attorney is considered the equitable assignee of the cause of action to the extent of his lien.

Third, A settlement entered into between the parties, either before or after judgment, in disregard of the lien and in prejudice of the attorney by reason of the insolvency of his client, or for other sufficient cause, will be set aside by the court so far as the attorney is concerned.[3]

It is believed that the above correctly states the present rule as declared by the Court of Appeals and that a settlement need not be "fraudulent and collusive" in the sense in which those words were used in the earlier cases, in order to justify the court in protecting the attorney.

Fourth, In case of such settlement before judgment, the court will allow the attorney to prosecute the action,[4] at

[1] Lee *v.* O. Co., 126 N. Y. 579; Poole *v.* Belcha, 131 N. Y. 200; Peri *v.* N. Y. C. & H. R. R. R. Co., 152 N. Y. 521.

[2] Peri *v.* N. Y. C. & H. R. R. R. Co., *supra.*

[3] Peri *v.* N. Y. C. & H. R. R. R. Co., *supra,* and cases cited.

[4] Stahl *v.* Wadsworth, 13 Civ. Proc. Rep. 32; Washburn *v.* Mott, 19 Civ. Pro. Rep. 439, *et al.*

his own risk and expense for the purpose of collecting his claim; but, in order to succeed, he must prove the original cause of action.[1]

Fifth, Under this section, the amount of recovery when the action is prosecuted, in case of settlement before judgment, is not limited to the taxable costs, even where the cause of action is non-assignable.[2]

Sixth, An application may, as formerly, be made by the attorney to vacate a satisfaction of the judgment executed by the client and to enforce the judgment by execution to the extent of the lien; but, being based upon facts wholly distinct from those passed upon on the trial of the action, it is a special proceeding and not a motion in the action, and, on such application, the court cannot summarily determine the amount of the lien;[3] but the existence and amount of the lien, beyond the taxable costs, must be established by proof presented before the court or a referee and only after the trial and determination of these questions, should execution issue.[4]

Seventh, In case of such settlement after judgment, the amount of judgment for damages and not the amount for which the judgment was compromised by the parties, furnishes the basis upon which the attorney's compensation, in excess of the taxable costs, is computed.[5]

This point does not appear in the report of the case,[6] but an examination of the papers on appeal shows that the report of the referee, which was confirmed by the Special Term, whose decision was affirmed by the Appellate Division and the Court of Appeals, awarded to the attorneys, in addition to the taxable costs, the sum of "$2,500, being one-half of the damages recovered," together with interest, although the total amount paid on the settlement was $4,200.

---

[1] Casucci *v.* Allegheny & Kinzua R. R. Co. 65 Hun, 452.

[2] Whittaker *v.* N. Y. C. & H. R. R. R. Co., 11 Civ. Pro. Rep. 189; Astrand *v.* Brooklyn Heights R. R. Co., 28 Civ. Pro. Rep. 113.

[3] Bailey *v.* Murphy, 136 N. Y. 50.

[4] Peri *v.* N. Y. C. & H. R. R. R. Co., 152 N. Y. 521. The latter part of the rule as to procedure is based upon what was done in the Peri case, and which received the approval of the Court of Appeals, by its affirmance of the decision of the lower court.

[5] Peri *v.* N. Y. C. & H. R. R. R. Co., *supra.* [6] 152 N. Y. 521.

In 1899, the Code section[1] was again amended by making the statute applicable to special proceedings as well as to actions, and by adding the last clause, which reads as follows, and relates simply to procedure: "The court, upon the petition of the client or attorney may determine and enforce the lien." The first question which naturally arises under this clause is whether it has the effect of changing the rule declared in Bailey *v.* Murphy, so that the court can now, in a summary manner, upon the application made in pursuance of this provision, determine the existence of the lien and its amount and order payment. This question may be considered as settled in the negative, but the answer, so far, at least, as it bears upon the procedure between an attorney and his client, is to be found in *dicta* and in the procedure which has actually been adopted by the courts, rather than in decisions in which the precise point was involved[2], and, in April, 1900, we have the point squarely decided by the Appellate Division, First Department, that the provision in question does not apply to a case where an attorney seeks to collect the amount of his lien from the adverse party, but that it merely aims at formulating a practice which, as between a client and his own attorney, "will enable the latter's lien to be determined or enforced by petition and order instead of by action."[3]

It was intimated in both the Pilkington and Rochfort cases that if it was intended by this provision to deprive a client of his right to a trial by jury on the question of his attorney's compensation, the provision was unconstitutional, this view being supported by an excusable interpretation of the opinion in the case of Bailey *v.* Murphy; but the Court of Appeals in the King case, in July, 1901, decided that the parties are not entitled to a jury trial, and that the remedy given by the section as it stands since the amendment of 1899, is not violative of the provisions of the constitution. That case was one where the attorneys instituted proceedings, under section 66, against their client to have the amount of their lien determined and enforced. The Special

[1] Sec. 66.

[2] Pilkington *v.* Brooklyn Heights R. R. Co., 49 App. Div. 22; Rochfort *v.* Met. St. R'y Co., 50 App. Div. 262; Matter of King, 168 N. Y. 54; Thomasson *v.* Latourette, 63 App. Div. 408.

[3] Rochfort *v.* Met. St. Ry. Co., *supra.*

Term appointed a referee to take proof and report, but the Appellate Division reversed this order upon the ground that the lien had been waived, and denied the prayer of the petitioners to have their lien determined and enforced. A minority of the Appellate Division also expressed the opinion that section 66 did not give the court jurisdiction to determine the amount of the indebtedness of the client to his attorney. The Court of Appeals held that there had been no waiver; that the section gave jurisdiction to the court to determine the lien; that, although the Special Term, in the exercise of its jurisdiction might have tried the question as to the value of the petitioner's services, and the existence of a lien without the aid of a referee, and although, if the Appellate Division had merely reversed the discretionary order appointing the referee, the Court of Appeals would have had no power to review that order of reversal, the petitioners could not be deprived of the remedy afforded by the Code, which is declared to be of an equitable character, and, therefore, triable by the court without a jury, and the Appellate Division having, in addition to reversing the order appointing a referee, denied the petitioner's application, the order became a final order in a special proceeding, appealable to and reviewable by the Court of Appeals, which reversed the same in so far as it denied the application.

It may, therefore, be considered as settled that under this section in its present form, an attorney, as against his own client, has an efficient remedy granted by the special proceeding provided for in the last clause of the section; that such proceeding is constitutional; that its employment cannot be denied him by the courts, and that it is available at any time when occasion arises for the enforcement of the lien, either before or after judgment, provided the lien has not been waived.

But in the majority of cases resort is had to the attorney's lien only when the attorney must obtain his compensation, if at all, from the adverse party, and it is of primary importance, therefore, to ascertain how the attorney may now enforce his claim against his client's opponent.

Under the decision of the Appellate Division in the Rochfort case, the special proceeding given by the section

is of no avail in such a case, and the attorney must seek his remedy by some procedure authorized by the decisions independently of this statutory provision.

If the settlement is effected after judgment, and he is entitled to relief, he may employ the method adopted in the Peri case, and approved by the Court of Appeals, and which is, in substance, the very same proceeding given by the clause of section 66, which has been under consideration, and which, by the Rochfort case, is limited in its application to cases arising between an attorney and his own client, so that in case of a settlement of this character, his remedy is adequate. But in case of settlement of the action before judgment, and the payment of the money to his client, from whom, by reason of insolvency or other sufficient cause, he cannot recover, he is in a much less favorable position, several decisions which have been made since the amendment of 1899, in connection with those rendered before, having rendered that position anything but desirable for the attorney; and, it may be questioned whether it is desirable for the adverse party.

It is to be noticed first that several comparatively recent decisions, conflicting in other respects, have united in considering the amount paid in settlement in such cases, as the basis upon which the amount of the attorney's compensation is to be computed[1], and that this view has been adopted even where it was strenuously urged that the settlement was made to "buy peace," and not in recognition of the existence of any cause of action.

It is to be noticed further that, where Special Term orders summarily determining the amount of the lien have been brought before the Appellate Division for consideration, that court, while denying, in the opinion, the right of the Special Term to make such summary determination, has failed to render the logical decision, reversing the order of the lower court, but has, by its own order, said to the defendant, unless you pay the attorney within twenty days the amount thus summarily determined, the plaintiff's

[1] Schriever *v.* Brooklyn Heights R. R. Co., 30 Misc. 145; Pilkington *v.* Brooklyn Heights R. R. Co., 49 App. Div. 22; Rochfort *v.* Met. St. R'y. Co., 50 App. Div. 261; Fenwick *v.* Mitchell, 34 Misc. 617.

attorney has leave to continue the original action for the enforcement and collection of his lien.[1]

It seems difficult, indeed, in any way, to justify the decision made in the Pilkington case, upon the facts as stated, and upon the reasoning adopted by the court. The case went to the Appellate Division upon an appeal from an order summarily determining the attorney's lien and directing payment, and, in stating the question presented, it is said:[2]

"In the cases in the books the settlement has been either in fraud of the attorney's rights, or, being made in good faith, was without any express provision for his benefit. Here the settlement appears to have been made in good faith, without fraud or collusion, and the defendant has assumed and agreed to adjust the attorney's lien. The question would, therefore, seem to resolve itself solely into one of practice, and to require only the determination of the mode in which to enforce the defendant's agreement made in the action. In this view the agreement of settlement is construed as an express promise on the part of the defendant to pay the plaintiff's attorneys the amount of their lien based on the sum of $2,600 as the value of the cause of action."

And in July, 1901, the same court in Thomasson *v.* Latourette[3] reaffirms this view of the facts presented for consideration in the Pilkington case.

Upon this view, we have a cause of action for damages for breach of contract, upon the trial of which the defendant as well as the attorney was entitled to a trial by jury of the questions involved under the contract, and of those questions only. Of this right the defendant and the attorney were both deprived by the order actually made. If, on the other hand, the attorney's claim is considered to be one for the enforcement of his statutory lien, the facts did not, under the decisions of the Court of Appeals, justify the order allowing the prosecution of the original action upon failure of the defendant to pay the sum specified, since the settlement was made in good faith, and with provision for the attorney's compensation.

Subsequent to the rendering of these decisions, attempts were made to collect the amount of the lien by an action of an equitable nature, brought by the attorney against his own client and the adverse party; and in April, 1901, it

[1] Pilkington *v.* Brooklyn Heights R. R. Co., 49 App. Div. 22; Rochfort *v.* Met. St. R'y. Co., 50 App. Div. 261. [2] At page 24.

[3] 63 App. Div. 408, at page 411.

was decided by the Special Term, Kings County, that such an action would lie.[1] In that case, after joinder of issue, in the original action, based on negligence, and the day before the cause was reached for trial, the plaintiff and defendant therein settled the action, without the attorney's consent, for the sum of $450, which was paid to the plaintiff, on the execution by him of a general release. The plaintiff spent the money, was without property and insolvent. It was held that upon settlement the lien given by the statute "was carried along to the sum agreed upon in settlement, the same as it is carried along to the judgment where there is one;" that no notice of the lien being necessary, payment of the whole amount to the plaintiff was payment in the defendant's own wrong so far as the attorney's claim was concerned; and that, as to him, the defendant must, in contemplation of law, be considered as still in possession of that portion of the money to which the attorney was entitled.

But this case must be considered as overruled by one decided by the Appellate Division of the same department in July, 1901.[2] The facts were substantially the same as in the Fenwick case, the attorney having a written agreement for a portion of the recovery, the action being settled by the parties after issue joined by the defendant paying to the plaintiff $1,500, and receiving a written release. No provision was made for the attorney's compensation, and the plaintiff was financially irresponsible and had departed for Norway after the settlement was made. The attorney brought an equitable action against the plaintiff and the defendant in the original action for the purpose of procuring the determination and enforcement of his lien. A demurrer interposed by the defendant in the original action upon the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained by the Special Term and the decision affirmed by the Appellate Division.[3] After a review of a number of decisions, it is declared that

"from the cases cited, and others which might be added, it clearly appears that the case presented is one in which the plaintiff is entitled to

[1] Fenwick *v.* Mitchell & Met. St. R'y. Co., 34 Misc. 617.

[2] Fischer-Hansen *v.* Brooklyn Heights R. R. Co., 63 App. Div. 356.

[3] 58 App. Div. 322.

relief, resulting in setting aside the release and continuing the action commenced in his client's name for the enforcement and collection of his lien; that such remedy, *being adequate, should be considered exclusive;* that no precedent existing for an independent equitable action, none should be established; that if the plaintiff elects to let the settlement stand, it operates to destroy his lien as against the respondent by extinguishing the cause of action out of which such lien arose."

The case of Deering *v.* Schreyer is distinguished, there being a specified fund to be reached in that case, and great stress is laid upon the case of Randall *v.* Wagenen[1], as upholding the decision rendered; but it is to be carefully noted that in the Randall case, although the decision was made in 1889, the settlement in question was made in 1877, before the amendment of section 66,—the court points out the fact that there was no lien until judgment, and says "we have found no case of an equitable action to enforce the *inchoate* right of an attorney under such circumstances."

Can the lien now given by statute upon the cause of action be considered an "*inchoate* right"?

It is undoubtedly true that under the circumstances existing in the Fenwick case, and the Fischer-Hansen case, an action to "foreclose the lien" would not lie, but it by no means follows that no action of an equitable character could be maintained under such circumstances to determine and enforce this statutory lien which, by the decisions, is declared to be a lien of a peculiar character, and which the statute itself says is not to be "affected by any settlement *before* or after judgment or final order"; and it is submitted that the reasoning in the Fenwick case, and in several of the cases decided by the Appellate Division and heretofore cited, as to the effect of a settlement on the cause of action, so far as this question of the lien is concerned, is sounder than the reasoning in the Fischer-Hansen case. But that case being the present law upon the subject, and the last decision which it is necessary to consider, we are now in a position to ascertain the situation of an attorney as against the adverse party when a settlement is made by the client before judgment.

Assuming first that the settlement is made without the attorney's knowledge, and that he is prejudiced thereby, he cannot bring an action of an equitable nature against the

[1] 115 N. Y. 527.

adverse party, and he cannot, under the decision in the Rochfort case, proceed under the last clause in section 66. There is but one remedy left. He may probably obtain leave of the court to prosecute the original action, although the last utterance of the Court of Appeals would seem to imply that to enable an attorney to set aside a settlement it must not only have prejudiced him, but it must have been made with intent to defraud him.[1] Granting, however, that leave to prosecute the action may be obtained, is the remedy "adequate" as often declared? Take the facts as they existed in the Fischer-Hansen case. The plaintiff had received compensation for his injuries, had no personal reason for testifying against the defendant, was insolvent and had gone to Norway.

The attorney, having procured leave to prosecute the action, would be obliged to prove the facts which would entitle the plaintiff to recover.[2] For success, it may be fairly assumed that the plaintiff's testimony would not only be material but absolutely necessary, and it would be a bold attorney who would venture to proceed, and run the risk of having judgment for costs rendered against himself, when he must prove his case by the evidence of a presumably hostile witness, whose testimony would have to be taken by a Closed Commission or under Letters Rogatory. Moreover, it would seem by the decisions that, if by any possibility the cause of action was established, the amount of the settlement might be proved as the basis upon which the attorney's compensation was to be computed, and as the value of the cause of action, although the attorney could not prove the settlement as establishing a cause of action. If, in view of these facts, the prosecution of the original action is an "adequate" remedy, it is a little difficult to conceive one that is inadequate.

But, assume that the attorney has been present when the settlement has been made, has protested against its terms, but that, notwithstanding his protest, it has been carried through, and the defendant, without the attorney's consent, pays the entire sum to the plaintiff, who leaves the State with it before the attorney can collect his claim. It

[1] Nat. Exhibit Co. *v.* Crane, 167 N. Y. 505.

[2] Cassuci *v.* Allegheny & Kinzua R. R. Co., 65 Hun, 452.

is not believed that any decision will be found authorizing the setting aside of such a settlement, and the prosecution of the action by the attorney; and if there is none, he would, in such a case (which is by no means an impossible one) be helpless against the adverse party under the decisions as they stand at present, for, under this assumption, as under the former one, he would be denied an equitable action, and could not have the benefit of the special proceeding provided for in section 66.

It is suggested that if the decision in the Rochfort case could be set aside, and an interpretation which is certainly not unwarranted placed upon the last clause of section 66, making it applicable to a case where the attorney desires to proceed against the adverse party—his own client would always be a proper and probably a necessary party to such proceeding—we should have (what was probably intended to be given by that clause) a special proceeding providing an adequate remedy in all cases, both before and after judgment, fair to all parties, and presenting to the court for decision the only questions which are properly at issue in such cases, viz., the existence of the lien and its amount. That there is no objection in principle to making this proceeding available against the adverse party is manifest from the Peri case, where the proceeding was against the adverse party, and was substantially the same proceeding that is now authorized by the section.

That the settlement in that case was after judgment does not, it is believed, affect the question, as there was no attempt in that case to follow the proceeds of the judgment, but the purpose of the proceeding was to collect of the defendant, who had made a payment in his own wrong, and since under the statute, since 1879, the lien is to be no more "affected" by a settlement before than after judgment, a payment made by a defendant in settlement before judgment is just as much a payment in his own wrong, so far as the attorney is concerned, as one made after judgment, and there seems to be no sound reason why the same proceeding, and against the same parties, should not be available in both cases. The only difference would be that in the one case, after the determination of the lien, the execution would issue on the judgment entered in the

original action; in the other it would issue on the judgment entered on the order or decree made by the court in the special proceeding.

In this article the enforcement of the lien has naturally been considered from the attorney's standpoint, but it is to be noticed that, if the special proceeding authorized by the Code is given the wide scope above suggested, there will be no excuse for the courts, in any case, to allow the prosecution of an original action, and thus, in case of a settlement which may have been perfectly fair, impose upon the defendant the unjust burden of the defense of that action, simply because the Special Term, upon the affidavits presented on the motion, has taken a sufficiently favorable view of the attorney's case to hold that he has been prejudiced by the settlement; and it is to be further noticed that the proceeding offers to defendants a fair opportunity to squarely attack the validity of agreements for contingent fees where the attorney seeks the client and tenders his services in consideration of the case being placed in his hands.

HENRY S. REDFIELD.